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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONTE MAURICE BAKER,

Defendant and Appellant.

B204005

(Los Angeles County
Super. Ct. No. BA304371)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael Johnson, Judge. Affirmed and remanded with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E.
Winters and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and
Respondent.

Donte Maurice Baker appeals the judgment entered following his conviction by jury of assault with force likely to produce great bodily injury in which he personally inflicted great bodily injury. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, subd. (a).)¹ The trial court found Baker had served four prior prison terms within the meaning of section 667.5, subdivision (b), and sentenced Baker to 10 years in state prison.

We affirm the judgment but order the abstract of judgment corrected.

FACTS AND PROCEDURAL BACKGROUND

1. Pretrial motion under section 995.

The evidence adduced at the preliminary hearing indicated that on May 31, 2006, Baker approached his neighbor, John Butler, from behind and punched him. Butler defended himself and placed Baker in a headlock. Baker then bit off a portion of Butler's ear. The People filed a complaint alleging mayhem in count 1 and assault with a great bodily injury enhancement in count 2.

Before trial, Baker filed a motion under section 995 in which he claimed great bodily injury was an element of mayhem in count 1 and there was insufficient evidence presented at the preliminary hearing to support the great bodily injury allegation as to count 2. The trial court agreed as to count 1 and struck the enhancement.

With respect to count 2, defense counsel noted the motion to strike the enhancement had been based on the assertion there was insufficient evidence in the "additional contact" between Baker and Butler to establish great bodily injury. However, defense counsel had been informed by the prosecutor that "it's an alternative pleading" and "the assault with GBI, [was] not [based on] a separate act," as defense counsel had believed.

¹ Subsequent unspecified statutory references are to the Penal Code.

The prosecutor stated, “[I]t was alleged in the alternative The People didn’t put on any evidence as to any other conduct that would amount to 245.”²

The trial court then denied the motion to dismiss the great bodily injury allegation as to count 2 because it was “an alternative pleading” to the count alleging mayhem.

2. The People’s trial evidence.

On the afternoon of May 31, 2006, John Butler was in front of his home on West 55th Street with his neighbor, Ernest Peterson. They had just returned from the store. Butler exited Peterson’s car and leaned over the window to speak to Peterson. Baker came across a yard, approached Butler from behind and hit Butler in the rear on his left side. Butler, who was in his late 50’s, had known 37-year-old Baker all his life. When Baker was young, Butler would “play fight” with Baker and the other children in the neighborhood. On this occasion, Butler told Baker to stop playing but Baker swung at him in the chest area with a closed fist. Butler protected himself. Butler punched Baker in the jaw, knocked him down and put Baker in a headlock. Baker bit Butler’s shoulder, bit Butler in the area of his eye, tried to gouge Butler’s eye and bit the top of Butler’s ear off. When Butler saw Baker spit out the top of his ear, Butler tightened his grip on Baker’s neck and said, “Give me a good reason why I shouldn’t kill you.” At that point, Peterson pulled Butler off of Baker.

Both men went to their respective homes. When Butler returned to the street, Baker said, “You can’t see now . . . because I put something in your eyes.”

Peterson testified Baker said, “I want you to respect my woman,” at the outset of the incident. After Baker bit Butler’s ear, blood was running everywhere. Baker asked Peterson for help. When Peterson heard Butler say, give me a reason not to kill

² Obviously, the prosecutor misspoke, intending to say the People did not put on any evidence as to any other conduct that would amount to great bodily injury (GBI), not “245,” assault. The People clearly had shown an assault. In fact, Baker’s motion did not seek to set aside count 2, only the great bodily injury enhancement attached to that count.

you, Peterson said, “Don’t hurt him. Get up and . . . quit this.” Peterson denied that Butler struck Baker with a bag containing cans of beer. Peterson testified he immediately assisted Baker when Baker asked for help.

Butler was taken to the hospital where his eyes were washed. His vision was impaired for three days to a week. Butler had teeth marks surrounding his left eye and received a stitch in that area. Butler’s ear was partially unattached and part of the ear had been bitten off. Butler received 180 stitches to reattach the ear. Peterson recovered the severed piece of Butler’s ear but doctors were unable to reattach it.

3. Defense evidence.

Baker testified in his own defense. Baker has always gotten along well with Butler and Peterson. Baker testified he and Butler had an avuncular relationship but Butler sometimes addressed Baker as “boy,” especially when Baker had been drinking. On the day of this incident, Baker and Butler agreed to fight later that day. Although they often fought in a playful way, he also testified, “it’s kind of rough” and the fight on that occasion was because he and Butler had “somewhat of an argument.”

When Baker saw Butler getting out of Peterson’s car, he walked towards Butler and called him “uncle bald head” and asked if he were ready to fight. Baker then gave Butler a “pop” in the chest, as was their practice. After the initial pop, Butler said, “go on boy,” but Baker “popped him like a couple more times.” Butler responded by hitting Baker in the eye with a bag containing a can of beer. Butler then punched Baker in the jaw causing him to fall backwards onto the sidewalk. Baker claimed he hit his head on the sidewalk causing a cut that resulted in a scar on the back of his head.³ Butler landed on top of Baker and put him in a choke hold. Baker panicked and asked Peterson to get Butler off him but Peterson smiled and said he could not help Baker. As Baker felt himself losing consciousness, he bit Butler’s ear.

³ Peterson testified Baker had the scar on the back of his head long before this incident. Baker claimed Peterson was lying about having seen the scar earlier because, a few days before this incident, Peterson requested a personal favor of Baker that Baker declined to perform. Baker believed Peterson held that against him.

Butler squeezed harder as if to break Baker's neck. Peterson continued to stand by without rendering assistance. Only when Baker poked Butler in the eyes did Petersen intercede and tell Butler, "That's enough."

Baker claimed he acted in self-defense because Butler was "choking the life out of me." Baker asserted he had to act decisively before he lost consciousness. Baker weighs 200 pounds and is 6 feet 2 inches; Butler is roughly the same size.

Baker left the scene because he is on parole and he knew the police were coming. Baker denied he attacked Butler from behind or that he initiated the aggression. When the prosecutor suggested there would have been blood on the sidewalk had Baker injured the back of his head, Baker agreed but indicated a neighbor rinsed the blood off him with a hose and probably also rinsed the blood off the sidewalk. Baker did not seek medical treatment for the wound to the back of his head because he thought it would heal better than it did.

4. Argument.

In closing argument, the prosecutor explained mayhem then addressed count 2, stating "it's charged kind of in the alternative. . . . Count [2] is an assault by means likely to produce great bodily injury, and that would really include the same action, the same biting the ear off. So first is that the defendant did an act that by its nature would directly and probably result in the application of force to a person, biting someone's ear. That's pretty clear. [¶] Second is that the force used was likely to produce great bodily injury. Biting someone's ear, likely to take a portion of the ear off. That part's clear. . . . This was a willful act. He was biting several different areas on John Butler's body. He meant to bite the victim in this case."

Defense counsel argued that although there were two charges, "it's really for the same offense. They are charging what they call the alternative. The assault has all these extra elements. It's not that you can say, okay, we find Mr. Baker punched him and that's the assault. And we find that that's the mayhem. It's the one act, the biting of the ear charged in two different ways." Defense counsel later stated Baker had been "charged with two crimes that are biting an ear."

Defense counsel argued Baker thought he was dying and bit Butler's ear and, in these circumstances, the act of biting Butler's ear was not unlawful. Therefore, Baker was not guilty.

5. *Deliberations.*

During deliberations, the jury asked the following question: "Are we to consider the assault charge based on the initial physical contact between Baker and Butler or the incident involving the ear biting?" The trial court indicated it intended to respond, "You should consider all of the evidence concerning the entire interaction between Baker and Butler."

Defense counsel objected and noted the pretrial motion to dismiss had been denied only because the People represented they were relying exclusively on the biting of the ear to establish the assault. Defense counsel complained the response proposed by the trial court suggested the jury might find Baker guilty of assault based on something other than biting the ear and the question indicated the jury was considering convicting Baker of assault based on some act other than biting Butler's ear.

This objection resulted in an extended colloquy as to how the trial court should respond to the jury's question. Before summarizing this discussion, we note defense counsel's objection was based on a faulty recollection of the ruling on the motion to dismiss. As noted above, Baker did not seek to set aside the count of assault, only the related allegation of great bodily injury. Also, at the hearing on the motion, the People conceded the great bodily injury allegation as to the assault count was based on the ear biting, as was the count of mayhem. We note at this juncture that nothing in this pretrial ruling limited what the jury could consider in determining whether Baker was guilty of assault.

However, the prosecutor exacerbated the situation by conceding that, at the hearing on the section 995 motion, the People represented the *assault count* was based exclusively on the act of biting the ear. In fact, the prosecutor conceded at the hearing that the great bodily injury allegation was based on the act of biting the ear. The prosecutor noted, nonetheless, that the "jury should consider all of the evidence . . .

because that goes to who's the initial aggressor, who has the right to self-defense; and so, . . . [i]t's the entire transaction."

The trial court agreed and stated the jury might acquit Baker of mayhem because it required malice. However, in considering assault, "they should consider everything." The trial court noted the counts were alternative only in the sense that Baker could not be punished for both offenses. Also, the jury might conclude that "all of the conduct could constitute an assault by force likely to produce great bodily injury, poking the eyes and all of the other things."

Defense counsel again objected count 2 had survived a motion to dismiss only because it deals specifically with the ear biting and nothing else and "the defense did not argue anything in trial or closing about any other assault or any other body part. It's all the ear." The trial court responded it did not believe the incident could be segmented into separate acts. "It was all one fight. In considering the charge, they may and should consider all of the evidence." The trial court concluded it would instruct as it initially had proposed.

The prosecutor then noted no unanimity instruction had been given and a conviction of assault might be set aside because some jurors convicted based on eye gouging and other jurors convicted based on ear biting.

The trial court responded, "It was all one transaction, all one fight within a matter of seconds as we've heard. I don't see any need for a unanimity instruction." The trial court also stated, "I didn't hear the preliminary hearing. I heard the trial, and I heard Mr. Butler testify about getting bitten on his shoulder, on his neck, on his eye. I saw a picture of his eye that was incredibly swollen and that had bite marks on the top of his eye, on the bottom of his eye. He testified that he was treated for an eye problem. [¶] I saw photographs of a portion of his ear missing. He received a number of things that had been presented to the trial jury. All I'm saying is that the jury's entitled [to] and should consider all of the evidence that was presented to them regarding the interaction between Butler and Baker."

When defense counsel continued to insist that count 2 involved only the ear biting, the trial court stated: “Well, all this is news to me. I must have been listening to a different trial, because I did hear cross-examination about his eye injury and did it really happen and why didn’t you report that to the police and so forth. Again, I didn’t rule on the 995, and . . . what you’re describing is a rather peculiar interpretation of the law; but in any event, this is the trial, and I’ve proceeded in the way that I think is appropriate and that the law provides. [¶] If there was something unique about the limitation of count [2], that should have been presented before the trial began.”

The trial court thereafter responded to the jury’s question as follows, “You should consider all of the evidence concerning the entire interaction between Baker and Butler. [¶] Please advise if you need further clarification on this or any other issue.”

6. *Verdicts.*

The jury found Butler not guilty of mayhem but convicted him of assault by means likely to produce great bodily injury and found that he personally inflicted great bodily injury in the commission of the offense.

7. *Motion for new trial.*

Baker filed a motion for new trial in which he claimed, inter alia, the trial court responded improperly to the jury’s question. In denying the motion, the trial court observed the question did not concern the great bodily injury enhancement but addressed what evidence the jury could consider with respect to the charge of assault. The trial court believed it had responded appropriately. In the course of its ruling, the trial court indicated it agreed with the jury’s finding the evidence did not demonstrate malice but found “there certainly is overwhelming evidence to support an assault and the great bodily injury enhancement.”

CONTENTIONS

Baker contends the trial court constructively amended the information by instructing the jurors they could convict Baker of assault based on conduct that occurred prior to biting Butler's ear, the trial court erroneously failed to instruct the jury on unanimity and the abstract of judgment must be corrected to reflect conviction of assault with force likely to produce great bodily injury.

DISCUSSION

1. *The trial court did not change the factual basis of count 2 or constructively amend the information.*

Baker contends the trial court's response to the jury's question constructively amended the information to permit the jury to convict on count 2 based on Baker's conduct prior to biting Butler's ear, thereby depriving Baker of fair notice of the specific criminal conduct for which he was required to prepare a defense. Baker argues he was specifically informed by the prosecutor and the ruling on the section 995 motion that the conduct underlying the assault and the great bodily injury enhancement was the act of biting Butler's ear. Baker asserts he reasonably concluded he was not facing criminal liability for the conduct relating to his actions prior to biting off Butler's ear because the prosecutor indicated the People were proceeding on the theory that count 2 specifically related to Baker's act of biting off part of Butler's ear.

Baker claims the trial court's instruction permitted the jury to convict on count 2 based on any of Baker's actions, such as hitting Butler in the back or biting Butler's face and around his eye. This constructive amendment deprived Baker of notice of the offenses for which he was on trial and violated his right to due process. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 167-170 [trial court instructed the jury it could consider the defendant's possession of a different gun than that specified in the information to convict the defendant of unlawful possession of a handgun]; *U.S. v. Shipsey* (9th Cir. 1999) 190 F.3d 1081, 1087; *Sheppard v. Rees* (9th Cir. 1990)

909 F.2d 1234, 1236-1238 [felony murder not listed in the information or reasonably anticipated by the defense].)

Baker asserts the trial court ambushed him and expanded the factual theory of criminal liability. Further, based on defense counsel's understanding the People's theory of guilt related only to the ear biting, defense counsel argued to the jury that both counts were "[t]he biting of the ear charged in two different ways." Also, defense counsel focused on the use of self-defense at the time the bite occurred.

Given the acquittal of mayhem, Baker concludes the jury must have based the assault conviction on conduct that preceded the ear biting such as the initial assault or the gouging of Butler's eye or biting of his face and eye, factual theories Baker specifically was informed the People would not rely upon. Baker notes Butler testified he was treated at the hospital for the injury to his eye and he could not see for four days to a week after the incident. Butler also received a stitch where Baker bit his face. Baker argues either of these injuries could have qualified as great bodily injury. (*People v. Escobar* (1992) 3 Cal.4th 740, 752.) Thus, according to Baker, the jury could have found great bodily injury apart from the biting of Butler's ear.

Because this court cannot determine if the jury convicted based on a legally correct theory, and cannot confidently conclude the trial court's error did not contribute to the verdict, Baker concludes the conviction must be reversed.

Baker's argument is not persuasive. The trial court clearly committed no error in telling the jury it could consider all the evidence in determining whether Baker committed assault.

As noted in the factual summary, defense counsel's trial objection was based on a faulty recollection of the proceedings on the section 995 motion. Baker did not seek to strike count 2. He sought to strike the great bodily injury allegation associated with count 2 because, apart from the act of biting of the ear which was charged as mayhem in count 1, there was no evidence of great bodily injury presented at the preliminary hearing. The prosecutor essentially agreed and indicated the allegation Baker

personally inflicted great bodily injury was not based on a separate incident but was an alternate pleading of the mayhem count.

However, the ruling on the motion under section 995 in no way limited the jury's consideration of the evidence on the charge of assault. Although the parties chose to focus on the ear biting in argument, nothing in the pretrial ruling on the section 995 motion required them to do so. In any event, the jury's question did not address the great bodily injury allegation, which was the subject of the pretrial motion, but the assault count. Also, the trial court merely told the jury to consider all the evidence in determining whether Baker was guilty of assault. The trial court did not instruct the jury the initial contact between Butler and Baker could form the basis of a conviction on count 2 and the trial court did not alter the factual underpinning of the information.

In any event, the jury found Baker personally inflicted great bodily injury in the commission of the assault. This finding demonstrates the jury did not convict Baker of assault based on the initial contact between Baker and Butler because there was no evidence Butler suffered any injury as a result of the initial contact.

In sum, the trial court committed no error in responding to the jury's question.

2. Instruction on unanimity was not needed in this case.

Baker contends the jury's question triggered a duty on the part of the trial court to give a unanimity instruction because it revealed the jury viewed the incident as two distinct transactions. Baker argues the failure to instruct on unanimity allowed the jury to convict based on either of two different sets of facts for which Baker offered different defenses. Baker asserts he defended the initial conduct by arguing he only lightly "popped" Butler in a playful manner and Butler overreacted by hitting Baker with a can of beer. With respect to the mayhem charge, Baker argued he had to use reasonable force to free himself from the headlock.

Baker notes the acquittal of mayhem indicates some of the jurors credited Baker's self-defense theory and therefore convicted on count 2 based on the initial contact between Baker and Butler. Alternatively, some jurors may have convicted Baker of assault based on the biting of the ear while others relied on the conduct that preceded the biting of the ear. Thus, there is a strong likelihood the verdict was not unanimous. Baker concludes the conviction on count 2 should be reversed.

Again, Baker's argument is not persuasive.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] . . . 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

However, a unanimity instruction is not required if the evidence shows one criminal act or multiple acts in a continuous course of conduct. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*Ibid.*)

Here, the acts that formed the assault charge were part of a single transaction that fell within the continuous conduct exception. The entire incident lasted "a few seconds," as the trial court noted in the discussion related to the response to the jury's question and, at most, a few minutes.

In any event, the jury could not have based its verdict on the initial contact between Baker and Butler because the jury unanimously found Baker personally inflicted great bodily injury in the course of the assault. However, the initial contact with Butler caused no injury. Thus, the verdict necessarily was based on Baker's action after Butler punched Baker and knocked him to the ground, namely, the eye biting, eye gouging and ear biting. As to these acts, Butler's defense was self-defense. There is no reason to conclude the jury disbelieved Baker's defense as to one of the acts but not the others.

Also, contrary to Baker's assertion, he offered the same defense, self-defense, to all the acts that caused injury to Butler. Further, Baker did not deny committing the acts. Thus, the question of guilt depended entirely on the jury's assessment of the credibility of the witnesses. If the jury believed Baker, he was guilty of no crime. If the jury believed Butler and Peterson, Baker assaulted Butler and personally inflicted great bodily injury.

Acquittal of mayhem is not inconsistent with the conviction of assault. As the trial court noted, the jury could find Baker did not act with malice, which is an element of mayhem but not assault.

In sum, because the instant case involved continuous conduct, no unanimity instruction was required. (*People v. Stankewitz, supra*, 51 Cal.3d at p. 100.)

3. The abstract of judgment must be corrected.

The abstract of judgment describes Baker's conviction as assault with a deadly weapon. Baker contends it should be corrected to reflect conviction of assault with force likely to produce great bodily injury. The People concede the point and it appears their concession is well taken. We shall order the abstract of judgment corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed. However, the cause is remanded to the superior court with directions to correct the abstract of judgment to reflect conviction of assault by means of force likely to produce great bodily injury and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the correction.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.